

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

ORIGINAL

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SEP 16 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) MM Docket No. 92-7
)
Amendment of Section 73.202(b),) RM-7879
Table of Allotments,)
FM Broadcast Stations)
(Scotland Neck and Pinetops,)
North Carolina))

**ORIGINAL
FILE**

To: Chief, Allocations Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

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SUMMARY

In this Petition for Reconsideration, Radio Triangle East Company ("RTE"), urges the Mass Media Bureau to correct several mistakes it made in its report and order in Scotland Neck and Pinetops, North Carolina, DA 92-971 (Alloc. Branch, released August 11, 1992) ("Report and Order"). In that Report and Order, the Bureau reallocated FM Channel 238C3 from Scotland Neck, North Carolina to Pinetops, North Carolina, over the objection of RTE.

RTE demonstrated that, contrary to the claims advanced by the permittee of the Scotland Neck channel, the reallocation of Channel 238C3 is an impermissible reallocation of a channel from a rural area to a much larger urbanized area (Rocky Mount, North Carolina). The "Pinetops" station would provide city-grade coverage to the entire Rocky Mount Urbanized Area; Rocky Mount is more than 30 times the population of Pinetops; and there was no reliable evidence whatsoever to show that Pinetops was independent from Rocky Mount. Under these circumstances, the proposal should have been viewed as a reallocation from Scotland Neck (which would be left with only a daytime-only AM station) to Rocky Mount (which has numerous FM and aural services), and rejected as not constituting a preferential arrangement of allotments.

In addition, the Bureau erred in not considering RTE's motion to strike the petitioner's pure hearsay assertions regarding the status of Pinetops as a community for allocation

purposes. The Bureau compounded its transgression by relying heavily on the wholly unreliable and uncorroborated claims advanced by petitioner.

In sum, the Bureau should, on reconsideration, determine that the proposed reallocation of Channel 238C3 from Scotland Neck to Pinetops, North Carolina would violate Section 1.420(i) of the Commission's rules, and retain Channel 238A at Scotland Neck.

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To: Chief, Allocations Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

Radio Triangle East Company ("RTE"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby seeks reconsideration of the Mass Media Bureau's decision to substitute Channel 238C3 for Channel 238A at Scotland Neck, North Carolina, and to reallocate Channel 238C3 from Scotland Neck to Pinetops, North Carolina. See Scotland Neck and Pinetops, North Carolina, DA 92-971 (Alloc. Branch, released August 11, 1992) ("Report and Order").

As shown below, the Bureau erred in finding that Pinetops is entitled to a first local transmission service preference. The Bureau ignored the reality of the situation that the Pinetops station would in fact be a Rocky Mount, North Carolina, station. Consequently, the proposed reallocation of Channel 238C3 to Pinetops would be an impermissible reallocation of a channel from a rural community (Scotland Neck) to a much larger urbanized area (Rocky Mount).

I. BACKGROUND

In its Comments in response to the notice of proposed rule making in Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 654 (Alloc. Branch 1992) ("NPRM"), RTE, licensee of an FM station in Rocky Mount, analyzed the proposed new community of license (Pinetops, North Carolina) pursuant to the methodology specified in Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7097 & nn 11, 14 (1990) ("Community Change Recon. Order"). It showed that petitioner failed to demonstrate that Pinetops is sufficiently independent from Rocky Mount to merit a first local service preference. See RTE Comments at 3-7.

Specifically, RTE showed that petitioner was forced by separation requirements to locate the transmitter for its contemplated "Pinetops" such that the station would clearly provide city-grade coverage to all of Rocky Mount. Id. at 2-3. In addition, RTE showed that there is a tremendous disparity between the 1990 U.S. Census populations of Rocky Mount (48,997) and Pinetops (1,514), with the former being more than 30 times larger than the proposed new community of license. Id. at 7. It also showed that statements made in petitioner's own petition for rule making weighed heavily in

favor of a determination that Pinetops is interdependent with -- or at least preclude a finding that Pinetops is independent from -- Rocky Mount. Id. at 6. RTE asserted that these showings required the conclusion that petitioner's proposal to reallocate station WWRT from Scotland Neck to Pinetops was, in effect, a proposal to reallocate a channel from a rural community to an urbanized area. RTE Comments at 2-3.

Because Pinetops is not entitled under Commission precedent to a first local service preference, RTE argued that the Bureau was required by those same Commission decisions to treat the proposed reallocation from Scotland Neck to Pinetops as a proposed reallocation from Scotland Neck to Rocky Mount. Once this is done, it is clear that the retention of Scotland Neck's only FM service is to be preferred over the allocation to Rocky Mount of a fifth local FM and ninth or tenth local aural service. Id. at 7-8 (and cases cited). Accordingly, RTE urged the Bureau to deny the proposed reallocation of station WWRT's channel from Scotland Neck to "Pinetops" as inconsistent with Section 1.420(i) of the Commission's rules.

In its reply comments, petitioner completely ignored RTE's demonstration that Pinetops is not sufficiently independent from Rocky Mount to merit a first local service preference. Instead, petitioner devoted its reply to an assertion that Pinetops is a "community" for allocation

purposes. See WYAL Radio, Inc. Reply Comments at 2-3. To support this essentially non-responsive assertion -- whether Pinetops is a "community" for allotment purposes is not determinative of the independence issue raised by RTE -- petitioner relied on a completely unsupported prose description of Pinetops that was contained in a self-described "Technical Statement" prepared by petitioner's Georgia-based consulting engineer. See id. at 2, Technical Statement at ¶ 5.

Following petitioner's reply comments, RTE moved to strike the portions of the pleading. The language from petitioner's technical statement regarding the status of Pinetops was complete hearsay. There were no citations to official records or publications, no statements from Pinetops community leaders or elected officials, and the consulting engineer's statement purported to draw legal conclusions (e.g., "Pinetops is an independent community"). RTE urged the Bureau to strike petitioner's claims about the "independence" of Pinetops from the record. RTE Motion to Strike (filed May 1, 1992).

In its Report and Order, the Bureau disregarded RTE's Motion to Strike as an unauthorized pleading that was not contemplated by the Commission's rules, and proceeded to give the bald hearsay assertions advanced in petitioner's reply comments full credit. Report and Order, DA 92-971, slip op. at

1 n.1. It then relied on those claims to conclude that Pinetops is sufficiently independent from Rocky Mount to merit a first local service preference -- and, in the process, impermissibly shifted to RTE the burden of proving that Pinetops was not independent from Rocky Mount. Id. at 1.

These actions were incorrect. RTE now urges the Bureau to correct its mistakes on reconsideration.

II. DISCUSSION

A. The Bureau Should Have Granted RTE's Motion To Strike.

The Bureau's claim that the Commission's rules do not contemplate the filing of "pleadings" beyond the comment and reply comment periods set forth in the NPRM (see Report and Order, DA 92-971, slip op. at 1 n.1) is incorrect. Section 1.415(d) specifies only that "[n]o additional comments may be filed unless specifically requested or authorized by the Commission." 47 C.F.R. § 1.415(d) (emphasis added). RTE did not file "additional comments" in violation of this regulation. Instead, it moved to strike unreliable comment material that had been filed by petitioner.

The Bureau's attempt to expand the reach of Section 1.415(d) to prohibit all post-reply comment "pleadings" paints with too broad a brush, as it would apply to all motions

(including motions for Commission authorization to file post-reply comment deadline comments). This clearly is not the intent of the restriction. See, e.g., Kerrville, Texas, 7 FCC Rcd 2093, 2093 n.1 (Alloc. Branch 1992) (Bureau accepts post-reply comment filing in interest of compiling a full record); Clarinda, Iowa, et al., 7 FCC Rcd 2318, 2318 n.3 (Alloc. Branch 1992) (Bureau finds public interest would be served by consideration of post-reply comment pleadings in allocation rule making proceeding). Thus, the Bureau should have considered RTE's Motion on its merits -- consideration that requires more than a cryptic, dicta assertion that RTE's motion "does not provide the Commission with any information of decisional significance." See Report and Order, DA 92-971, slip op. at 1 n.1.

**B. The Bureau Should Not Have Relied Upon
Petitioner's Hearsay Statements About Pinetops'
Community Status.**

Further compounding the error of its refusal to consider RTE's Motion to Strike, the Bureau then relied on the hearsay data supplied by petitioner in deciding to reallocate the channel authorized to unbuilt station WWRT from Scotland Neck to Pinetops. The Bureau stated that:

We find that the arguments advanced by Radio Triangle to be unpersuasive. We do not believe that Pinetops should be credited with the

services already licensed to Rocky Mount since the community is not located within the Urbanized Area. Pinetops has its own local government, police and fire services, businesses, civic organizations and religious institutions which identify themselves with Pinetops. Other than the population differential between Rocky Mount and Pinetops and the lack of a local telephone directory, Radio Triangle presents no information to dispute that Pinetops is an independent community.

Report and Order, DA 92-971, slip op. at 1. This determination forms the sole basis for the Bureau's conclusion that the proposed reallocation would result in a preferential arrangement of allotments.

As RTE asserted in its Motion to Strike, however, the "evidence" of Pinetops' status as a community (i.e., the assertions of local businesses, government, and community services) is based exclusively upon the hearsay representations of a consulting engineer retained by petitioner. The Bureau should not have credited these claims. Petitioner's consultant does not claim to have personal knowledge of the truthfulness of the matters he is asserting. He is in fact located in Georgia, and there was no showing that he was competent to make these representations. As such, these mere uncorroborated representations fail in any way to show that Pinetops is a community for allocation purposes. See Robert B. Taylor, 7 FCC Rcd 3142, 3142 (Mass Media Bureau 1992) (hearsay

representations of an attorney, standing alone, fail to raise substantial and material question of fact).

C. The Bureau Erred In Finding That Pinetops Is Entitled To A First Local Service Preference; Pinetops Was Not Shown To Be Independent From Rocky Mount.

Even if the statements of petitioner's consulting engineer (which were credited and relied upon heavily by the Bureau) were reliable, they would still show only that Pinetops is a community for allocation purposes; they would not demonstrate its independence from Rocky Mount, nor its entitlement to a first local service preference. See Fairfield and Norwood, Ohio, 7 FCC Rcd 2377, 2378 (Allocations Branch 1992) (facts that Norwood, Ohio is incorporated, has bank, post office, and own zip code clearly support Norwood's status as a community, but "are not sufficient to show that Norwood is independent . . .").

The Bureau recently reiterated the criteria it considers in determining whether a community is sufficiently independent to merit a first local service preference:

The Commission relies primarily on three criteria to determine if a preference is warranted. First, "signal population coverage" is examined. This refers to the degree to which the proposed station could provide service not only to the suburban community, but to the adjacent metropolis as well. Second, we examine the size of the suburban community relative to the

adjacent city, its proximity to the city, and whether the suburban community is within the Urbanized Area of the central city. Third, we determine the interdependence of the suburban community with the central city, looking at a wide range of evidence concerning work patterns, media services, opinions of suburban residents, community institutions, and community services. If the station could provide service to the metropolis, and if the community is relatively small, is within the Urbanized Area, and exhibits a high degree of interdependence with the metropolis, we are generally disinclined to grant a first local transmission service preference to the proposal.

Fairfield and Norwood, Ohio, 7 FCC Rcd at 2378 (citing RKO General (KFRC), 5 FCC Rcd at 3222 (1990), and Community Change Recon. Order, 5 FCC Rcd at 7097 n.14)). When this standard is applied to the proposed reallocation to Pinetops, the Bureau must conclude that it erroneously granted a first local service preference.

Under the first prong of the standard, the Bureau is obliged to analyze the degree to which the proposed WWRT(FM) facility would cover the Rocky Mount Urbanized Area. By virtue of the limitations placed on the transmitter sites for Channel 238C3 at Pinetops, 100 percent city-grade coverage of the Rocky Mount Urbanized Area is assured. The first step of the analysis must thus be resolved against the proposed reallocation.

It is under the second prong that the Bureau must consider petitioner's uncontroverted assertion that Pinetops is

not located within the Rocky Mount Urbanized Area. (As RTE pointed out in its Comments, whether a proposed new community of license is located within or outside the boundaries of an urbanized area is not determinative on the issue of a community's entitlement to a first local service preference; instead, it is but one of several components of the second of three factors the Commission must analyze. See RTE Comments at 4-5; Motion to Strike at 4.) While Pinetops is not immediately adjacent to Rocky Mount, there are no communities in between them. In any event, the near adjacency of Pinetops and Rocky Mount must be considered in conjunction with the fact that Rocky Mount is more than 30 times larger than Pinetops in population.

In Fairfield and Norwood, Ohio -- a case where the proposed reallocation was denied -- the smaller community was located within the Urbanized Area, but the larger metropolitan area was only 15 times the size of the proposed new community of license. 7 FCC Rcd at 2378. The analysis under this prong of the test, even if not clearly mandating the denial of the proposal, requires the Bureau to consider much more evidence than it addressed in its Report and Order.

Finally, the Bureau must completely reconsider its treatment of the interdependence prong of the applicable test. First of all, it is incumbent upon the Bureau to find that a

community of license change proposal will result in a preferential arrangement of allotments before the proposal can be approved. See Community Change Recon. Order, 5 FCC Rcd at 7094. Whether this requirement means that the petitioner must demonstrate the existence of such a preferential arrangement, or that the Bureau must undertake its own analysis before a public interest determination may be made, is irrelevant here. What is clear is that it is completely contrary to the intent of the Commission for the Bureau to deem a preferential arrangement of allotments to exist in all instances where third parties such as RTE fail to demonstrate the absence of a preferential arrangement of allotments. The Bureau's placement on RTE of the burden of proving a negative was reversible error.

In any event, the only creditable evidence on the "interdependence" prong of the test -- the fact that Pinetops does not have its own telephone directory provided by the local telephone company -- was submitted by RTE and cuts against a finding that Pinetops is independent from Rocky Mount. Petitioner submitted no evidence whatsoever regarding work patterns of Pinetops residents, media services available there, or statements from local political and civic leaders. Compare Fairfield and Norwood, Ohio, supra (reallotment denied notwithstanding submission of supporting letters from mayor of proposed new community).

When all of the evidence properly before the Bureau is considered pursuant to the applicable standard, it is clear that the "community" of Pinetops is not entitled to a first local service preference. Thus, as part of Rocky Mount for allocation purposes, the comparison at issue in this proceeding is between Scotland Neck (a community with only a daytime AM service) and Rocky Mount (with numerous full-time AM and FM services). It is clear that the retention of a first local FM service at Scotland Neck is to be preferred over the allotment of an additional FM service to Rocky Mount. See RTE Comments at 7-8.

This conclusion is enhanced, as RTE argued, by the fact that removal of station WWRT's channel from Scotland Neck leaves that community without a full-time local service, as the community's only other local service is a daytime AM station. While the Bureau cites to the Community Change Recon. Order as support for its disregard of this assertion (see Report and Order, DA 92-971, slip op. at 1 & n.3), this is a policy determination that has no obvious nexus to the Commission's longstanding policy favoring establishment and retention of first local FM services for communities lacking in full-time local aural services. See Revision of FM Assignment Policies and Procedures, 90 F.C.C.2d 88 (1982). In addition, while the Bureau asserts that the community of Scotland Neck would

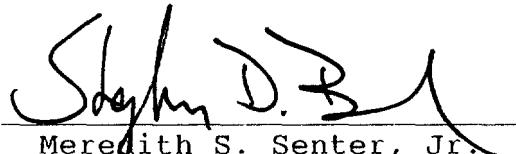
receive coverage from petitioner's proposed "Pinetops" facility (see Report and Order, DA 92-971, slip op. at 1), it failed to analyze the extent to which persons within the coverage area of the current Scotland Neck facility would lose service as a result of the proposed reallocation or to determine how well those persons who would lose service from station WWRT are presently served by other aural services.

III. CONCLUSION

On the basis of the foregoing discussion, RTE urges the Bureau to reconsider its decision to reallocate FM Channel 238C3 from Scotland Neck to Rocky Mount. When the errors recited above are corrected, the retention of FM Channel 238A at Scotland Neck (the channel cannot be upgraded to Class C3 while at Scotland Neck) is the only result to reach here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katharine K. Bryant, do hereby certify that a copy of the foregoing "Petition for Reconsideration" was mailed, United States first-class postage prepaid, this 16th day of September 1992, to the following:

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